89-875

Supreme Court, U.S.
FILED
DEC 1 1989
JOSEPH F. SPANIOL, JR.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1989

ROBERT E. FELKER,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

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3981

QUESTIONS PRESENTED FOR REVIEW

1. Did the trial court deny the Petitioner his right to due process of law by erroneously instructing the jury that under 75 Pa.C.S. § 3742--requiring motorists to stop and render assistance after accidents involving death or serious injury--the Petitioner could be convicted on the basis of simple negligence rather than on the basis of a knowing or reckless violation?

2. Did the warrantless search of the Petitioner's vehicle while in police custody, and the seizure of items from its exterior, constitute a violation of the fourth amendment, where the vehicle was itself evidence of a crime and there was ample opportunity to obtain a search warrant?

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3 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 7.3(b) at 80 (2d ed. 1987) 32

OPINIONS BELOW

The decision of the Supreme Court of Pennsylvania denying the Petition for Allowance of Appeal was rendered on October 2, 1989, and is set forth in the Appendix at A-1. The decision of the Superior Court of Pennsylvania is set forth in the Appendix at A-2. The opinion of the Court of Common Pleas of Monroe County, which was incorporated by the superior court and attached to its opinion in an appendix, appears in the Appendix at A-34.

JURISDICTION

The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1257(a). The final disposition of this case below was the denial of the Petition for Allowance of Appeal filed by the Supreme Court of Pennsylvania on October 2, 1989 (App. at A-1).

CONSTITUTIONAL PROVISIONS INVOLVED

The fourteenth amendment states in part:

> nor shall any state deprive any person of life, liberty, or property without due process of law[.]

The fourth amendment to the United States Constitution states in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

75 Pa.C.S. § 3742 states in part:

Accidents involving death or personal injury

(a) General rule.--The driver of any vehicle involved in an accident resulting in injury or death of any person shall immediately stop the vehicle at the scene of the accident or as close thereto as possible but shall then forthwith return to and in every event shall remain at the scene of the accident until he has fulfilled the requirements of section 3744 (relating to duty to give information and render aid). Every stop shall be made without obstructing traffic more than is necessary.

(b) Penalties.--

(1) Except as otherwise provided in this section, any person violating this section commits a misdemeanor of the third degree.

18 Pa.C.S. § 302(b) and (c) provide:

General requirements of culpability

. . . .

(b) Kinds of culpability defined.--

(1) A person acts intentionally with respect to a material element of an offense when:

(i) if the element in-

volves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and

(ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

(2) A person acts knowingly with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and

(ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

(3) A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material

element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and intent of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation.

(4) A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and intent of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

(c) Culpability required unless otherwise provided.--When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts intentionally, knowingly or recklessly with respect thereto.

18 Pa.C.S. § 1104 states:

Sentence of imprisonment for mis-

demeanors

> A person who has been convicted of a misdemeanor may be sentenced to imprisonment for a definite term which shall be fixed by the court and shall be not more than:
>
> (1) Five years in the case of a misdemeanor of the first degree.
>
> (2) Two years in the case of a misdemeanor of the second degree.
>
> (3) One year in the case of a misdemeanor of the third degree.

STATEMENT OF THE CASE

Some time during the evening of February 26, 1987, a pedestrian on an unlighted street with no sidewalk in Stroudsburg, Pennsylvania, was struck and killed by a motor vehicle. There were no eyewitnesses to the accident, but several persons living on the street heard what they described as two

thuds, following which the body was found.

The next morning, the Petitioner, Robert E. Felker, read about the accident in the newspaper. He had been driving on the street where the accident occurred at or about the time of the accident and had hit the curb and knew that he had grazed a telephone pole. Felker did not cause any damage to the pole and was unaware at the time of the accident that he might also have struck a pedestrian, who apparently was in the highway. Upon reading the newspaper, Felker first realized that his vehicle might have struck a pedestrian. He immediately contacted his attorney, who called the local police and notified them of what Felker had told him.

After this call, a police officer visited Felker at his place of business and examined Felker's pick-up truck, which showed

signs of having recently been involved in a collision. Felker admitted that the truck was his and that he had been operating the truck the night before.

With Felker's consent, the truck was impounded at that time and, the following day, Pennsylvania State Trooper Richard Sachs conducted a investigation of the accident, including a search of the truck. During his search of the truck, Sachs removed several pieces of physical evidence, including a mirror and grill. This evidence was taken without benefit of a search warrant and without the consent of Felker.

Based upon the evidence seized, Sachs concluded that Felker's truck was the vehicle which struck the victim, and Felker was then charged and following a preliminary hearing was bound over for trial under several statutes: Involuntary Manslaughter

(18 Pa.C.S. § 2504(a)); Recklessly Endangering Another Person (18 Pa.C.S. § 2705); Homicide by Vehicle (75 Pa. C.S. §3732); Reckless Driving (75 Pa.C.S. § 3714); Accidents Involving Death or Personal Injury (75 Pa.C.S. § 3742), Duty to Give Information and Render Aid (75 Pa.C.S. § 3744(a)); and Driving Vehicle at Safe Speed (75 Pa.C.S. § 3361). As a result of a Motion to Quash, the court dismissed the charges of Involuntary Manslaughter, Homicide by Vehicle, and Recklessly Endangering Another Person.

At the suppression hearing, the court denied Felker's Motion to Suppress Physical Evidence (see Record at 16a), ruling that because the officer removed items from the outside of Felker's car where they were plainly visible, no legitimate expectation of privacy interest was implicated and thus no search or seizure took place (App. at A-19).

At trial, the trial court dismissed the counts pertaining to Driving at Safe Speed and Duty to Give Information and Render Aid. At the conclusion of all testimony, the case was submitted to the jury on the two remaining counts, Accidents Involving Death or Personal Injury and Reckless Driving. The trial court instructed the jurors with regard to the hit-and-run statute that Felker could be convicted if they found that "the defendant knew or in the exercise of reasonable care should have known that his truck was involved in an accident resulting in injury or death to a person" (R. at 362a; App. at A-40 (emphasis added)). This instruction was given over the objection of Felker, who argued that it erroneously permitted a conviction on the basis of a simple negligence standard, whereas the statute required a showing of knowledge or recklessness (R. at 376a, 379a).

Felker was ultimately convicted on both counts and was sentenced to one year of probation, a $2,500 fine, and 250 hours of community service. An appeal was taken to the Superior Court of Pennsylvania, which affirmed the convictions, and to the Supreme Court of Pennsylvania, in which Felker argued both that the search of his truck violated the fourth amendment and that "[t]he conviction of Defendant/Appellant based on the civil negligence standard violates both Article I, Section 9 of the Pennsylvania Constitution and the due process clauses of the 5th and 14th Amendments to the United States Constitution" (Petition for Allowance of Appeal at 5; App. at A-58). The Pennsylvania Supreme Court denied Felker's Petition for Allowance of Appeal in a per curiam decision.

ARGUMENT

I. THE PETITIONER WAS DENIED DUE PROCESS BECAUSE THE STATE TRIAL COURT AND APPELLATE COURT INTERPRETED A STATE CRIMINAL PROVISION IN A MANNER WHICH CHANGED THE ELEMENTS OF THE CRIME.

The Petitioner, Robert E. Felker, was convicted for violating the provisions of 75 Pa.C.S. § 3742, which states in pertinent part:

> The driver of any vehicle involved in an accident resulting in injury or death of any person shall immediately stop the vehicle at the scene of the accident . . . until he has fulfilled the requirements of section 3744 (relating to duty to give information and render aid).

This provision does not, by its terms, provide for any mental culpability or mental state. Therefore, to determine the necessary mental state for a violation of § 3744, the

provisions of 18 Pa.C.S. § 302 must be consulted. This section states generally that, unless otherwise provided, "a person is not guilty of an offense unless he acted intentionally, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense." Subsection (c) contains the necessary mental state applicable to this case:

> (c) Culpability required unless otherwise provided.--When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts intentionally, knowingly or recklessly with respect thereto.

(Emphasis added.) "Recklessly" is defined in subsection (b)(3), which provides that a person acts recklessly "when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct" (emphasis added). The

subsection further states that the disregard of the risk must be a "gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation."

By contrast, negligent conduct is described in subsection (b)(4) as when a person "should be aware of a substantial and unjustifiable risk that the material element exists" (emphasis added).

These provisions make it clear that the Pennsylvania legislature intended a conviction under § 3744 only in those circumstances in which the defendant intentionally, knowingly, or recklessly violated the provision. Significantly, a mere negligent violation is not, under the clear guidelines set forth, sufficient to constitute a violation.

Despite the unambiguous nature of the required mental state for a violation of §

3744, the trial court instructed the jury in this case that mere negligence alone would support a conviction of Felker. In its charge to the jury, the trial court stated:

> The defendant is charged with a misdemeanor offense of violating a provision of the Motor Vehicle Code commonly known as Hit and Run. In order to find the defendant guilty of this charge, you must find that the Commonwealth has proven beyond a reasonable doubt the following elements:
>
> 1. that the defendant <u>knew or in the exercise of reasonable care should have known</u> that his truck was involved in an accident resulting in injury or death to a person.
>
> 2. that the defendant did not stop and remain at the scene of the accident in order to render aid and provide information.

(R. at 363a (emphasis added).) Obviously, the trial court substituted a simple negligence standard in lieu of the recklessness standard required by the statute. Thus, acting on this erroneous instruction, the jury

could well have improperly convicted Felker on the basis that he should have known that he was involved in an accident involving death or injury.

This Court has long recognized that a conviction in state court violates federal due process provisions unless all of the elements of the state crime are proven beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979); Patterson v. New York, 432 U.S. 197 (1977); In re Winship, 397 U.S. 358 (1970). In this case, because of the improper jury instruction, all of the elements of the Pennsylvania statute cannot be said to have been proven beyond a reasonable doubt, because the jury was evaluating the case in light of the wrong element of mental intent. Thus, Felker's due process rights were violated by the trial judge and by the refusal of the appellate court to rectify the situa-

tion.

In essence, the due process violation in this case is the same as the failure of a state to give fair warning of the conduct which is criminal under a statute. This Court stated in United States v. Harris, 347 U.S. 612, 617 (1954):

> The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.

In addition, this Court has applied this rule to situations in which the legislation itself was clear, but the courts applying it modified it so as to bring within the scope of the statute conduct which should not have been deemed criminal. In Bouie v. City of Columbia, 378 U.S. 347, 352 (1964), for ex-

ample, the Court stated:

> There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language. As the Court recognized in Pierce v. United States, 314 U.S. 306, 311, "judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness."

The principle involved in this case was most directly addressed in a recent case from the Fifth Circuit Court of Appeal. In Baptist v. Blackburn, 786 F.2d 704 (5th Cir. 1986), the defendant was convicted of armed robbery in a Louisiana state trial, although there was a conflict in the evidence as to whether the defendant had actually had a gun during the robbery. The trial court instructed the jury that "if the victim thinks the man has a gun and surrenders his money to

him, then it is armed robbery." Id. at 705. However, the statute defining armed robbery required that the robber commit theft by force or intimidation "while armed with a dangerous weapon." Id. Despite this clear error in instruction, the Louisiana Appellate Courts refused to reverse the defendant's conviction.

The Fifth Circuit found that by instructing the jury that armed robbery can result from the victim's mere subjective belief in the presence of a weapon, the trial judge reformulated the definition of the crime. Because the instructions given at trial did not adequately describe the elements of armed robbery as contained in the Louisiana statute, the defendant's right to a fair trial was denied. Id. at 706. In the words of the court:

> Once the legislature of such a state as Louisiana defines a crime,

> due process requires the state's courts to follow its definition or, at the least, to refrain from expanding it to delete significant elements of the definition ex post facto.

Id.; see also Prantil v. California, 843 F.2d 314 (9th Cir. 1988) (recognizing rule that erroneous instructions on state law crime can constitute violation of federal due process clause); Darnell v. Swinney, 823 F.2d 299 (9th Cir. 1987), cert. denied, 108 S. Ct. 1012 (1988) (same).

It should be noted that while the trial court and appellate court below relied on Commonwealth v. Kauffman, 323 Pa. Super. 363, 470 A.2d 634 (1983), for the holding that a simple negligence standard was appropriate in a hit-and-run case, the Kauffman case involved a different statute, 75 Pa.C.S. § 3743, which under the legislative scheme is a "summary offense" carrying a different maxi-

mum prison sentence and different culpability standards. See 18 Pa.C.S. § 305 (permitting simple negligence standard in summary offenses); 18 Pa.C.S. § 106(c) (summary offenses include those with a maximum prison term of 90 days). By contrast, the maximum sentence under 75 Pa.C.S. § 3742(a) is one year. See 75 Pa.C.S. § 3742(b)(1); 18 Pa.C.S. § 1104 (defining length of sentence in misdemeanor cases; one year in the case of a misdemeanor of the third degree). Thus, despite the conclusions of the trial court and the appellate courts, the Kauffman case could have no bearing on the culpability requirement in this case.

In short, because of the erroneous jury instruction given by the trial court, Felker was denied his right to a fair trial and his right to due process of law under the fourteenth amendment to the United States Consti-

tution. The appellate court reviewing his conviction merely compounded the error of the trial court by failing to recognize that the trial court had enlarged the elements of the crime by permitting conviction on the basis of negligence rather than on the knowing or grossly reckless standard required by the statute. Because the state courts arbitrarily refused to follow the definition of the crime as contained in the statute, due process requires reversal of Felker's conviction.

II. THE SEARCH AND SEIZURE OF ITEMS FROM THE PETITIONER'S VEHICLE WAS VIOLATIVE OF THE FOURTH AMENDMENT BECAUSE THE POLICE FAILED TO OBTAIN A WARRANT.

In this case, evidence critical to the conviction of Felker was seized after a war-

rantless search of his vehicle, a pick-up truck, while the truck was in police custody. The truck had been impounded by the police after Felker notified them that he had been operating the truck and had struck a telephone pole on the street where the victim had been killed. Not until two days following the accident, however, did an officer examine the truck for evidence. At that time, pieces of the truck's side mirror, grill, and paint were removed and sent to a police laboratory for analysis. Testimony at trial linked this evidence with the death of the victim and provided the evidence which led the jury to believe that Felker's truck had hit the victim.

This Court has long recognized that warrantless searches are per se unreasonable unless supported by one of the specifically established and well-delineated exceptions to

the warrant requirement. Katz v. United States, 389 U.S. 347 (1969); Coolidge v. New Hampshire, 403 U.S. 443 (1971). One of these exceptions identified by this Court is the automobile exception, which provides that under certain circumstances police may dispense with the need to obtain a search warrant to search a motor vehicle because of the inherent mobility and reduced expectation of privacy in motor vehicles. Chambers v. Maroney, 399 U.S. 42 (1970); California v. Carney, 471 U.S. 386 (1985).

The court below ruled that the scraping of paint from Felker's truck and the removal of other physical evidence from the truck was not a search because Felker had no expectation of privacy in the exterior of his automobile. This conclusion was not supported by citations to any relevant case law. In fact, however, the removal of evidence from Felk-

er's truck was a seizure for purposes of the fourth amendment.

This Court has not definitively resolved the question of whether there is a legitimate expectation of privacy in the exterior of a motor vehicle such that the examination of evidence removed from the outside of the vehicle is a search under the fourth amendment. In Cardwell v. Lewis, 417 U.S. 583 (1974), a plurality of the Court upheld the validity of the warrantless examination of tires and removal of paint scrapings from a car, but the actual basis of the holding is uncertain. While the Court stated at one point that "the invasion of privacy, if it can be said to exist, is abstract and theoretical," id. at 592, it then went on to state that "[u]nder circumstances such as these, where probable cause exists, a warrantless examination of the exterior of a car is not unreasonable

under the Fourth and Fourteenth Amendments." Id. Thus, Cardwell can be interpreted to mean either that there was no legitimate expectation of privacy in the exterior of a vehicle or that there was probable cause to search and thus the Court did not determine the expectation of privacy issue.

As noted above, Cardwell was a plurality opinion, and thus the decision in that case does not have the precedential value of a decision of the majority of the Court. Moreover, since Cardwell, this Court has refined the rules regarding expectations of privacy in such cases as Arizona v. Hicks, 480 U.S. 321 (1987). In Arizona v. Hicks, supra, the Court recognized that while a cursory inspection of an item in plain view did not constitute a search, moving the item to reveal further information produced an invasion of privacy which amounted to a search requiring

probable cause.

Similarly, in this case, while the fact that the officer visually examined the exterior of Felker's truck could be said not to implicate any legitimate expectation of privacy, the removal of evidence for the express purpose of scientific analysis elevated the officer's actions into a search. Drawing the line in this manner makes sense from a practical standpoint; in ordinary affairs, an owner of a vehicle would not have a legitimate expectation that other persons would not look at his vehicle--even very closely--but he certainly would have a legitimate expectation that nothing would be removed from his car without his permission.

This conclusion has been shared by at least one recent state court decision which is in conflict with the lower court in this case. In People v. Robinson, 209 Cal. App.

3d 1047, 257 Cal. Rptr. 772 (1989), the court held under circumstances similar to those in this case that the removal of paint scrapings from a car was a search requiring probable cause. Also analogizing to Arizona v. Hicks, supra, the court concluded:

> [W]e conclude that the officer's conduct in scraping off a layer of paint on appellant's car in order to observe the color of the underlying coat constituted both a "search" and a "seizure" within the meaning of the Fourth Amendment. By scraping off the blue paint, he engaged in an intentional act which had as its purpose the acquisition of physical control over that paint sample. (Brower v. County of Inyo, supra, ___ U.S. at pp. ___, 109 S.Ct. at pp. 1380-1381). Further, that act when done for the purpose of observing the underlying coat of paint involved more than "merely looking at what is already exposed to view, without disturbing it. . . ." (Arizona v. Hicks, supra, 480 U.S. at p. 328, 107 S.Ct. at p. 1154).

257 Cal. Rptr. at 777.

This case thus affords this Court the

opportunity to clarify the principles concerning the expectation of privacy in the exterior of motor vehicles and to resolve a conflict in state cases over the circumstances in which the removal of evidence from the exterior of a vehicle constitutes a search and seizure.

Because of its erroneous ruling that the removal of evidence from Felker's truck was not a search or seizure, the court below did not reach the question of whether the warrantless search was justified. Again, the decisions of this Court are not dispositive on this issue. In Cardwell v. Lewis, supra, the plurality opinion indicated that if a warrantless search of a car which was itself evidence of a crime had been permitted at the time the car was discovered, the delay in searching would have had no bearing on whether a warrant was necessary; however, the

majority of the Court did not reach that conclusion. As noted by Justice Stewart's dissenting opinion in Cardwell, joined by three other justices, the automobile exception was not available to uphold the warrantless seizure of the defendant's car in circumstances where there was "absolutely no likelihood that the respondent could have either moved the car or meddled with it during the time necessary to obtain a search warrant." 417 U.S. at 598.

Of course, in this case there was no chance that the truck would have been moved before a warrant to search it could have been obtained, for the truck had been impounded by the police. The situation is thus even more appropriate than in Coolidge v. New Hampshire, supra, for a finding that the automobile exception to the warrant requirement should not apply. In Coolidge, the plurality

opinion held that since the officers knew that they were going to seize an automobile and could have obtained a warrant in advance, the officers could not rely on the plain view exception to seize the automobile.

The recent automobile exception cases of this Court have stretched the exception to the limits of its original justification--the mobility of motor vehicles--but as of yet the majority of the Court has not ruled in a case in which the automobile itself was the evidence of the crime and there was no possibility that the vehicle could be moved prior to the search without a warrant.

There are weighty reasons for treating a motor vehicle differently if it itself is the evidence of the crime rather than simply the repository of items which are sought in connection with a crime. As pointed out by a leading commentator on fourth amendment is-

sues, the seizure of a car as evidence is more intrusive than the search of the car, and for that reason deserves the added protection of the warrant process. 3 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 7.3(b) at 80 (2d ed. 1987); see also State v. Foster, 110 Idaho 848, 718 P.2d 1286 (Ct. App. 1986) (once a car is impounded and immobile, the automobile exception to the warrant requirement is inapplicable, and the validity of the seizure and subsequent search should be judged under standards applicable to containers, not automobiles).

This case thus presents the Court with the opportunity to directly address the precise basis and limits of the automobile exception to the warrant requirement in those situations in which the motor vehicle is itself the evidence of the crime.

CONCLUSION

For all of the foregoing reasons, the Petitioner, Robert Felker, requests this Court to grant his Petition for Writ of Certiorari.

Respectfully submitted,

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Counsel of Record

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TO THE SUPREME COURT OF PENNSYLVANIA

APPENDIX

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Counsel of Record

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SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

October 4, 1989

John A. Hiscott, Esquire
HISCOTT and ROBINSON
900 Scott Street
Stroudsburg, PA 18360

RE: Commonwealth of Pennsylvania v. Robert E. Felker, Petitioner NO. 464 E.D. ALLOCATUR DOCKET 1989

Dear Mr. Hiscott:

This is to advise you that the following Order has been endorsed on your Petition for Allowance of Appeal, filed in the above captioned matter:

"October 2, 1989.

Petition Denied.

Per Curiam."

Very truly yours,

PATRICK TASSOS
Deputy Prothonotary

/mz

cc: E. David Christine, Esquire
Hon. Ronald E. Vican

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
ROBERT E. FELKER, Appellant	:	No. 02442 Philadelphia 1988

Appeal from the Judgment of Sentence July 20, 1988 in the Court of Common Pleas of Monroe County, Criminal No. 231 of 1987.

BEFORE: CIRILLO, P.J., and BECK and TAMILIA, JJ.

MEMORANDUM:

This is an appeal from a judgment of sentence entered in the Court of Common Pleas of Monroe County.

On February 26, 1987, appellant Robert E. Felker was involved in a fatal accident. At approximately 10:24 p.m., while driving his pick-up truck on North Eighth Street in a Stroudsburg, Pennsylvania, Felker struck a

pedestrian, Frank Livingston, and then collided with a telephone pole. Felker did not stop at the scene of the accident, but proceeded home for the evening. The next morning, through his attorney, Felker notified the police that he had operated his truck on North Eighth Street the previous evening. Stroudsburg Police Chief John Pansy visited Felker at his place of business. Felker's attorney was present. Officer Pansy asked Felker for permission to impound the pick-up truck. Felker consented. After the vehicle was impounded, several pieces of physical evidence, including the mirror and grill of the truck, were removed.

Felker was charged with several offenses, including Involuntary Manslaughter, Recklessly Endangering Another Person, Homicide by Vehicle, Homicide by Vehicle while Driving Under the Influence, Driving Under

the Influence of Alcohol or Controlled Substances, Accidents Involving Death or Personal Injury (Hit and Run), Duty to Give Information and Render Aid, Accidents Involving Damage to Unattended Vehicle or Property, Driving Vehicle at Safe Speed, and Reckless Driving. At the preliminary hearing, the Commonwealth dropped the alcohol-related charges.

Following a jury trial, Felker was convicted of Reckless Driving, 75 Pa.C.S. §3714, a summary offense, and Hit and Run, 75 Pa.C.S. §3742(a), a misdemeanor. Post-trial motions were filed and denied. Felker was sentenced to one year probation, a $2,500.00 fine, and 250 hours of community service. On appeal, Felker raises three issues for our review:

> 1. Whether the Commonwealth of Pennsylvania must prove beyond a reasonable doubt that the defendant had actual knowledge that he had

struck another person with a motor vehicle, as an element of the offense of Accidents Involving Death or Personal Injury (Hit and Run)?

2. Where the defendant has raised the defense of substantial compliance to the motor vehicle offense of Accidents Involving Death or Personal Injury (Hit and Run), must the trial court charge the jury that substantial compliance with the statute is sufficient to avoid conviction?

3. Whether the fruits of a warrantless search of defendant's vehicle must be suppressed where the vehicle had been rendered immobile prior to the search; and where no exigent circumstances existed?

Based upon our review of the parties' briefs and the record before us, we conclude that the suppression court's opinion, authored by the Honorable Ronald E. Vican, and the trial court's opinion, authored by the Honorable Peter J. O'Brien, have adequately discussed and disposed of the issues. We therefore affirm the judgment of sentence based upon these opinions, copies of which

are attached for purposes of allocatur.

Judgment of sentence affirmed.

COMMONWEALTH OF PENNSYLVANIA	:	IN THE
	:	SUPERIOR
VS.	:	COURT OF
	:	PENNSYLVANIA
ROBERT E. FELKER, Appellant	:	No. 2442
	:	Philadelphia
	:	1988

COURT OF COMMON PLEAS OF MONROE COUNTY
FORTY-THIRD JUDICIAL DISTRICT
COMMONWEALTH OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	NO. 231 - 1987
	:	CRIMINAL
VS.	:	
	:	
ROBERT E. FELKER	:	

OPINION

Defendant was involved in a fatal automobile-pedestrian accident on February 26, 1987. He was subsequently charged with the following offenses: Involuntary Manslaughter, 18 Pa.C.S.A. §2504(A); Recklessly Endangering Another Person, 18 Pa.C.S.A. §2705; Homicide By Vehicle, 75 Pa.C.S.A. §3732; Homicide By Vehicle While Driving Under the Influence, 75 Pa.C.S.A. §3735(A); Driving Under

the Influence of Alcohol or Controlled Substance, 75 Pa.C.S.A. §3731(A)(1); Accidents Involving Death or Personal Injury, 75 Pa. C.S.A. §3742(A); Duty to Give Information and Render Aid, 75 Pa.C.S.A. §3744; Accidents Involving Damage to Unattended Vehicle or Property, 75 Pa.C.S.A. §3745(A); Driving Vehicle at Safe Speed, 75 Pa.C.S.A. §3361; Maximum Speed Limits, 75 Pa.C.S.A. §3362(A)(3); and Reckless Driving, 75 Pa.C.S.A. §3714.

At Defendant's Preliminary Hearing before District Magistrate Dale A. Keenhold, the Commonwealth dropped the charges of Homicide by Vehicle While Driving Under the Influence, Driving Under the Influence and Damage to Unattended Vehicle or Property. District Magistrate Keenhold dismissed the charge of Maximum Speed Limits. Defendant

was bound over on the remaining charges.[1]

By proper procedure, Defendant filed a multi-count Omnibus Pretrial Motion. Summarized and listed in the order in which they will be discussed, the counts in Defendant's Motion seek:

1. To change the venue/venire (Count I);

2. To prohibit the Commonwealth from introducing at trial opinion evidence as to the ultimate issues in the present case, evidence as to Defendant's consumption of alcohol on the day of the accident and the testimony of a medical examiner as to the speed of Defendant's vehicle (Count IV);

3. To suppress various physical

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[1]As to the remaining charges, Defendant admits that the Commonwealth has established a prima facie case in regard to the charges of Accidents Involving Death or Personal Injury and Duty to Give Information and Render Aid.

evidence (Count III); and

4. To quash the charges of Involuntary Manslaughter, Homicide by Vehicle and Recklessly Endangering Another Person (Count II).

On July 22, 1987, a hearing was held regarding Defendant's Motion. At that time, the parties entered into several stipulations and agreed that the transcript of the Preliminary Hearing, along with accident analysis and reconstruction reports, would be used in lieu of testimony. Subsequently, both parties submitted letter-briefs to this court. All of the above have been made a part of the record and were taken into consideration by this Court in the formulation of this Opinion.

FINDINGS OF FACT

From the record of the case now before

it, this court has extrapolated, solely for the purpose of answering Defendant's Motion, the following information:

1. Defendant was involved in a fatal automobile-pedestrian accident on February 26, 1987, at approximately 10:24 p.m.

2. The accident occurred on North Eighth Street in Stroudsburg, Monroe County, Pennsylvania. At the time of the accident, the posted speed limit was 25 miles per hour.

3. On the night of the accident, there was no adverse road or weather conditions.

4. There were no eyewitnesses to either the accident or the manner in which Defendant was driving his automobile prior to the accident; however, several persons residing near the scene heard the accident.

5. The accident resulted in the death of Stroudsburg resident Frank Living-

ston, a pedestrian.

6. At the time of the accident Mr. Livingston was in the roadway.

7. Defendant did not stop at the scene of the accident and did not immediately contact the police.

8. Shortly after the accident, Stroudsburg Police Officer Richard Wolbert conducted an investigation of the accident. His investigation included, among other things, making hand-drawn maps of the area and procuring various pieces of the physical evidence located at and around the accident scene. He also examined the body of Mr. Livingston.

9. On February 27, 1987, the day after the accident, Defendant, through an attorney, contacted the Stroudsburg Police Department and informed them that he had operated his vehicle on North Eighth Street

the previous night and that he had been in an accident.

10. At approximately, 8:50 a.m. on February 27, 1987, Stroudsburg Police Chief John Pansy, as part of the ongoing investigation of the accident, visited Defendant at his place of business.

11. When Chief Pansy arrived, Defendant was accompanied by an attorney.

12. During his investigation, Chief Pansy espied a pickup truck showing signs of having recently been in a collision parked at Defendant's place of business. Defendant admitted that the truck belonged to him and that he was the only person who operated the truck on February 26, 1987.

13. Thereafter, with Defendant's consent, the truck was impounded by the Stroudsburg Police Department. It remained in their control until the Preliminary Hear-

ing.

14. Also on February 27, 1987, Dr. Isidore Mihalakis conducted an autopsy on Mr. Livingston in the morgue at Pocono Hospital. Dr. Mihalakis testified that, in his opinion, Defendant was travelling between 35 and 50 miles per hour at the time of the accident.

15. On February 28, 1987, Pennsylvania State Trooper Richard Sachs conducted an investigation of the accident. Trooper Sachs examined the accident scene, Mr. Livingston's body and Defendant's truck. At all three places he procured or examined evidence.

16. During the investigation of the accident, several pieces of physical evidence, including but not limited to a mirror and a grill, were removed from Defendant's truck. All items which were removed from the truck were removed subsequent to the

impoundment of the truck, without a warrant, without Defendant's express consent and absent exigent circumstances.

17. Subsequent to the accident, Sergeant William Yodice of the fatal accident unit of the New Jersey State Police conducted an accident study and analysis. On the basis of this study, Sergeant Yodice filed two reports. Both of the reports contain opinions of fact linking Defendant to the accident as well as opinions as to the ultimate legal issues in the present case.

DISCUSSION

Motion for Change of Venue/Venire

Since the filing of his Omnibus Pretrial Motion, Defendant has withdrawn his Motion for Change of Venue/Venire, and hence, there is no need to address this issue.

Motion in Limine: Prohibition of Testimony

Defendant has requested that the Commonwealth be prohibited from introducing the testimony of Sergeant Yodice as to the ultimate issues in the present case, as well as evidence of Defendant's alcohol consumption on the day of the accident. On these narrow issues, however, the parties have represented to this court that they have reached an agreement whereby neither Sergeant Yodice's opinion testimony nor evidence of Defendant's alcohol consumption will be introduced at trial. Thus, we will not discuss Defendant's requests regarding these matters.

Defendant has additionally requested, however, that the Commonwealth be prohibited from introducing Dr. Mihalakis' opinion testimony as to the speed of Defendant's vehicle at the time of the accident. On this matter, we must deny Defendant's request. We do so

based, for the most part, on our discussion of a similar issue in the analogous case of Commonwealth v. Frable, No. 54-1987 Criminal (C.P. Monroe, June 12, 1987).

As we indicated in Frable, it is now well-established that police officers, engineers and other witnesses may state an opinion as to the approximate speed of a vehicle involved in an accident. Frable, supra, at 4. See Morris v. Morris, 290 Pa. Super. 587, 435 A.2d 184 (1981) (Police Officers); Rosato v. Nationwide Ins. Co., 263 Pa. Super. 587, 397 A.2d 1238 (1979) (Police Officers); Stacey v. Thrower Trucking, Inc., 253 Pa. Super. 150, 384 A.2d 1274 (1978) (Engineer); Haeberle v. Peterson, 262 Pa. Super. 247, 396 A.2d 738 (1978) (Reconstruction Expert). See generally, Annot., 29 A.L.R.3d 248 (1970 & Supp. 1986). Further, our Supreme Court stated that:

> If a witness has any reasonable pretension to a specialized knowledge on the subject under investigation he may testify, and the weight to be given the evidence is for the jury.

Moodie v. Westinghouse Electric Corp., 367 Pa. 493, 501, 80 A.2d 734, 738-39 (1951) (citations omitted). Applying the above to the instant case, it becomes patently clear that Dr. Mihalakis should be allowed to testify.

Dr. Mihalakis is a medically-trained professional. He examined Mr. Livingston's body the day after the accident. His opinion as to the speed of Defendant's vehicle at the time of the accident is based, in part, on his experience as a forensic pathologist, his personal studies on the dynamics between speed and the destruction of body parts, the literature of his profession, National Safety Council Studies, information given to him by the police and his own examination of the

victim's body. Thus, Dr. Mihalakis' opinion is based upon reasonable, articulable factors, and he has a "reasonable pretension to specialized knowledge" concerning the present case. Consequently, he should be allowed to testify at trial.

Suppression of Physical Evidence

Defendant has alleged that during the investigation of the accident, various pieces of physical evidence were removed from his truck by the police. Further, that they were removed after the truck was impounded, while the truck was in the control of the police, without a warrant or Defendant's express consent and absent exigent circumstances. Therefore, Defendant contends the evidence was obtained in violation of his constitutional rights and should be suppressed. We find no merit in Defendant's contention.

At the outset, we note that motor vehicles, although privy to constitutional safeguards, are generally accorded a diminished expectation of privacy based upon their inherent mobility. Commonwealth v. Milyak, 508 Pa. 2, 7-8, 493 A.2d 1346, 1349 (1985) (citing Commonwealth v. Timko, 491 Pa. 32, 38, 417 A.2d 620, 623 (1980); United States v. Chadwick, 433 U.S. 1 (1977). More specifically, "[t]he primary aim of the Fourth Amendment is to protect people from unreasonable intrusions of legitimate expectations of privacy." Commonwealth v. Tann, 500 Pa. 593, 598-99, 459 A.2d 322, 325 (1983) (citing United States v. Salvucci, 448 U.S. 83 (1980); Rawlings v. Kentucky, 448 U.S. 98 (1980); Rakas v. Illinois, 439 U.S. 128 (1978)). Thus, it is not surprising that our Superior Court has stated that "[i]t is now well-established that in order to challenge

successfully a warrantless search, the challenger must have a legitimate expectation of privacy in the area or property searched[.]" Commonwealth v. Cihylak, 337 Pa. Super. 221, 226, 486 A.2d 987, 990 (1985) (citing Katz v. United States, 389 U.S. 347 (1967). See also, Commonwealth v. Pinkins, 343 Pa. Super. 44, 493 A.2d 1365 (1985) (reasonable expectations of privacy invoke Fourth Amendment protection).

While these rules are easy to state, there is no definitive test to apply in order to determine if a person has a legitimate or reasonable expectation of privacy sufficient to invoke constitutional protection. Instead, our Appellate Courts have held that the determination of whether or not a given defendant has a sufficient expectation of privacy should be tested by the totality of the circumstances surrounding the case. Pin-

kins, supra, at ___, 493 A.2d at 1373 (citing Commonwealth v. Latshaw, 481 Pa. 296, 392 A.2d 1301 (1978), cert. den. 441 U.S. 931 (1979)). Applying this test to the case sub judice, it becomes clear, as discussed infra, that Defendant did not have an expectation of privacy sufficient to afford him the requested relief.

In the present case, the Defendant was involved in an automobile-pedestrian accident in which a man was killed. He fled the scene; however, at the scene, pieces of Defendant's truck, linking him to the accident, were found. Defendant was cognizant of this fact.

The next day, Defendant, upon the advice of and through an attorney, voluntarily phoned the police and informed them that the night before he had been driving on the road on which the accident occurred. Subsequent-

ly, upon the advice and in the presence of an attorney, he voluntarily consented to the impoundment of his truck. At the time the truck was impounded it showed signs of having recently been in a collision, and Defendant knew he was under investigation for the accident. Finally, the items that were removed from the truck, as well as the damaged condition of the truck, were plainly visible, both at the time the truck was impounded and at the time they were removed. Under these circumstances, we hold that Defendant did not have a reasonable or legitimate expectation of privacy in his truck or the pieces that were removed therefrom. Therefore, we deny Defendant's request to have the evidence suppressed.

Motion to Quash

Defendant has alleged that the Common-

wealth has not established a prima facie case of Involuntary Manslaughter, Homicide by Vehicle or Recklessly Endangering Another; thus, he requests that these charges be quashed. Based upon the stipulated record now before us, a record which has been diminished appreciably by intriguing circumstances, we must, as discussed below, agree with Defendant.

Recently, in the analogous case of Commonwealth v. Frable, No. 54-1987 Criminal (C.P. Monroe, June 12, 1987), this Court discussed the three charges contested by Defendant in the case at bar. Regarding the crime of Homicide by Vehicle, we stated, citing Commonwealth v. Heck, 341 Pa. Super. 183, 194, 491 A.2d 212, 216 (1985) and 75 Pa. C.S.A. § 3732, that:

> To establish Homicide by Vehicle, the Commonwealth must prove that there was a knowing violation of a traffic law or regulation, a death

> must occur and the death must have been a probable consequence of the Defendant's violation.

Frable, supra, at 7. Additionally, the Commonwealth, in order to prove Homicide by Vehicle must show, at the minimum, that the Defendant's actions constituted gross negligence.

In order to support a charge of Involuntary Manslaughter, the Commonwealth must establish that the Defendant committed an "unlawful act in a reckless or grossly negligent manner, or. . .a lawful act in a reckless or grossly negligent manner." 18 Pa. C.S.A. §2504. Similarly, to support a charge of Recklessly Endangering Another, the Commonwealth must show that the Defendant "recklessly engage[d] in conduct which. . . [placed] another in danger of death or serious bodily injury." 18 Pa. C.S.A. §2705. Finally, for purposes of the Crimes Code, "A

person acts recklessly. . .when he consciously disregards a substantial and unjustifiable risk." 18 Pa. C.S.A. §302(b)(3).

At the outset of the instant case, the Commonwealth believed it had sufficient evidence to support the three charges that Defendant contests herein, as well as the charges that were dropped or dismissed at the Preliminary Hearing. Indeed, the record reveals that at one point in this case, evidence existed which, among other things, purported to show that Defendant was intoxicated and that excess speed played a role in the death of Mr. Livingston. However, certain events which transpired during the investigatory and pretrial stages of this case changed the posture of this case dramatically. The practical effect of this change was to remove putative evidence from our review, or ameliorate it to such an extent that it

will not support the contested charges. At the present time, the evidence of which we may take cognizance discloses little more than the fact that Defendant was involved in an accident in which another person was killed.

During the initial investigation of the accident, the police discovered two bartenders who had served alcoholic beverages to Defendant on the night of the accident. Their original statements to the investigating officers apparently indicated that Defendant had been served several mixed drinks. Based upon the information gleaned from the bartenders, the Commonwealth charged Defendant with the alcohol-related charges enumerated above. However, at the Preliminary Hearing, the bartenders gave a version of events which was inconsistent with that recorded by the officers. In the words

of the Assistant District Attorney who appeared for the Commonwealth:

> [T]he testimony of the bartenders is different from that originally received by the police and in fact shows a different number of drinks[. Therefore,] we cannot . . .indicate. . .the blood alcohol level of the defendant at the time of this offense.

N.T. pp. 141-142. The Commonwealth did not produce any other evidence as to Defendant's consumption of alcohol. Accordingly, the Commonwealth dropped all of the alcohol-related charges.

Similarly, at one point in this case the Commonwealth believed that it possessed evidence that Defendant was speeding at the time of the accident. This belief was based solely upon the testimony of Dr. Mihalakis, the pathologist assigned to the instant case. At the Preliminary Hearing, Dr. Mihalakis testified that in his opinion, Defendant was

travelling between 35 and 50 miles per hour at the time of impact. N/T p. 77. The posted speed limit on North Eighth Street was 25 miles per hour. However, it was discovered that at the time of the accident the speed limit signs were improperly posted.[2] Thus, by statute,[3] the speed limit became 35 miles per hour. Apparently, this fact prompted the dismissal of the a Maximum Speed Limits charge.

Our perusal of the record discloses that the Commonwealth's case against Defendant on

---

[2]The fact that the speed limit signs were improperly posted does not appear in the stipulated record now before us. However, in communications to which counsel for the Commonwealth was privy, counsel for Defendant has represented to this Court that the signs were, indeed, posted incorrectly. The Commonwealth did not object to this assertion nor to the dismissal of the Maximum Speed Limits Charge. Thus, we take the "fact" of the improper posting of the speed limit signs as true.

[3]75 Pa. C.S.A. §3362(1).

the contested charges centered around the evidence, discussed above, relating to Defendant's consumption of alcohol on the night of the accident and his speeding at the time of the accident. In fact, for all practical purposes, the Commonwealth preferred no other evidence relating to the contested charges. Without evidence of alcohol consumption, the evidence is insufficient to establish that Defendant had been intoxicated within the purview of the DUI statutes, and thereby prohibits a finding of reckless or grossly negligent conduct. Similarly, had the Commonwealth been able to show that Defendant had been travelling faster than 35 miles per hour, a finding of recklessness or grossly negligent conduct may have been warranted. As it stands, however, there is no competent evidence as to Defendant's purported intoxication, and similarly, Dr. Mihalakis'

testimony, the only evidence which appears in the record regarding the speed at which Defendant was travelling, is not inconsistent with the speed limit that was in effect on the date of the accident.

In sum, the Commonwealth has introduced no relevant, legally cognizable evidence that Defendant acted recklessly, with a conscious disregard of a known risk or in a grossly negligent manner. Accordingly, the charges of Involuntary Manslaughter, Homicide by Vehicle and Recklessly Endangering Another must be dismissed.

CONCLUSIONS OF LAW

1. Defendant has withdrawn his Motion for Change of Venue/Venire;

2. Dr. Mihalakis has a reasonable pretension to specialized knowledge of the subject of the February 26, 1987 accident;

3. Defendant did not have a reasonable, legitimate expectation of privacy in his truck sufficient to warrant the suppression of the evidence removed therefrom; and

4. The Commonwealth has failed to establish a prima facie case on the charges of Involuntary Manslaughter, Homicide by Vehicle and Recklessly Endangering Another.

ORDER

AND NOW, this 5th day of February, 1988, it is ORDERED that:

1. Dr. Mihalakis shall be permitted to testify at trial;

2. Defendant's Motion to Suppress Physical Evidence is DENIED;

3. Defendant's Motion to Quash the Counts of Involuntary Manslaughter, Homicide by Vehicle and Recklessly Endangering Another is GRANTED.

The charges which remain against Defendant are as follows:

1. Accidents Involving Death or Personal Injury;

2. Duty to Give Information and Render Aid;

3. Driving Vehicle at Safe Speed; and

4. Reckless Driving.

BY THE COURT:

_____

COURT OF COMMON PLEAS OF MONROE COUNTY
FORTY-THIRD JUDICIAL DISTRICT
COMMONWEALTH OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	No. 231
	:	Criminal of
vs.	:	1987
	:	
ROBERT E. FELKER,	:	
	:	POST-VERDICT
Defendant	:	MOTIONS

OPINION

On March 17, 1988, Robert E. Felker was convicted by a jury of the misdemeanor offense of hit and run (75 Pa.C.S.A. 3742(a)) and the summary offense of Reckless Driving (75 Pa.C.S.A. 3714). Timely Post-Verdict Motions were filed and the following issues were argued by counsel for Defendant:

> (1) Whether physical evidence was properly admitted at trial which had been removed by police from Defendant's truck after the vehicle had been impounded by police but without a search warrant?
>
> (2) Whether the Commonwealth must establish that the Defendant had actual knowledge that his ve-

hicle was involved in an accident resulting in injury or death in order to convict of hit and run?

(3) Whether the trial court erred when it denied Defendant's proposed Point for Charge No. 1?

After briefs and argument, Defendant's Motions are now before the Court for disposition.

On the evening of February 26, 1987, the Defendant was involved in a fatal automobile-pedestrian accident. At approximately 10:24 p.m. while driving his pick-up truck in a northerly direction on North Eighth Street in Stroudsburg, Monroe County, Pennsylvania, Defendant struck Frank Livingston and subsequently collided with a telephone pole. The Defendant did not stop at the scene of the accident but proceeded to his residence and retired for the evening. The following morning Defendant, through an attorney, did contact the Stroudsburg Police Department and

informed them that he had operated his vehicle on North Eighth Street the previous night and had collided with a telephone pole. As a result, Stroudsburg Police Chief John Pansy visited the Defendant and his attorney at Defendant's place of business. When Chief Pansy noticed the pick-up truck which showed signs of a recent collision he asked for and received Defendant's consent to have the truck impounded. After impoundment of the vehicle, several pieces of physical evidence, including but not limited to a mirror and grill were removed from the truck. These items were removed without a search warrant.

The first issue argued by defense counsel is whether the items obtained from Defendant's vehicle by police without a warrant were properly admitted as evidence at trial. The Honorable Ronald E. Vican disposed of this issue at the pre-trial stage of these

proceedings and we adopt his analysis of the issue. Judge Vican noted that a successful challenge to a warrantless search requires that the challenger have a legitimate expectation of privacy in the area of property to be searched. Commonwealth v. Cihylak, 337 Pa. Super. 221, 226, 486 A.2d 987, 990 (1985); Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Whether or not a given defendant has a sufficient expectation of privacy must be tested by the totality of the circumstances surrounding the case. Commonwealth v. Pinkins, 514 Pa. 418, 525 A.2d 1189 (1987).

In the present case, Defendant was involved in an automobile-pedestrian accident in which a man was killed. He fled the scene; however, at the scene, pieces of Defendant's truck, linking him to the accident, were found. Defendant was cognizant of this

fact.

The next day, Defendant, upon the advice of and through an attorney, voluntarily phoned the police and informed them that the night before he had been driving on the road on which the accident occurred. Subsequently, upon the advice and in the presence of an attorney, he voluntarily consented to impoundment of his truck. At the time the truck was impounded it showed signs of having recently been in a collision, and Defendant knew he was under investigation for the accident. Finally, the items that were removed from the truck, as well as the damaged condition of the truck, were plainly visible, both at the time the truck was impounded and at the time they were removed. Under these circumstances, the Defendant did not have a reasonable or legitimate expectation of privacy in his truck or the pieces that were removed

therefrom. Defendant's reliance on Commonwealth v. Ball, 254 Pa. Super. 148, 385 A.2d 568 (1978) is misplaced. In Ball, two state troopers investigating a hit and run, clandestinely went on the defendant's property in the early hours of the morning for the purpose of examining defendant's truck. The facts in Ball therefore involved a more intrusive invasion of the defendant's privacy interest than in the case at bar.

The other two issues argued by defense counsel involve the Court's instruction to the jury on the charge of hit and run. This Court gave the following instruction on hit and run:

> "The defendant is charged with a misdemeanor offense of violating a provision of the Motor Vehicle Code commonly known as Hit and Run. In order to find the defendant guilty of this charge, you must find that the Commonwealth has proven beyond a reasonable doubt the following elements:

1. that the defendant knew or in the exercise of reasonable care should have known that his truck was involved in an accident resulting in injury or death to a person.

2. that the defendant did not stop and remain at the scene of the accident in order to render aid and provide information.

The duty of rendering aid requires the driver to give to any person injured in the accident reasonable assistance, including carrying the injured person to a physician or a hospital for treatment, if it is apparent that treatment is necessary.

The duty to give information requires the driver to identify himself and his vehicle to any person injured, or to the police if they are present and available to receive such information, or immediately report the accident to the police.

If the evidence convinces you beyond a reasonable doubt that while driving his truck the defendant was involved in an accident which he knew or in the exercise of reasonable care should have known resulted in injury or death to a person and he did not fulfill the duty to stop and render aid and provide information, you should find the defendant guilty. Other-

wise, you must find the defendant not guilty." (N/TR 343-344).

The instruction was premised upon the following statutory provision:

> "(a) The driver of any vehicle involved in an accident resulting in injury or death of any person shall immediately stop the vehicle at the scene of the accident or as close thereto as possible but shall then forthwith return to and in every event shall remain at the scene of the accident until he has fulfilled the requirements of section 3744 (relating to duty to give information and render aid). Every stop shall be made without obstructing traffic more than is necessary." (75 Pa.C.S.A. 3742a).

Counsel for Defendant argues that the Commonwealth must establish that the Defendant had actual knowledge that his vehicle was involved in an accident resulting in injury or death. 75 Pa. C.S.A. 3743 was enacted as part of the Vehicle Code and is derived from the Uniform Vehicle Code and Model Traffic Ordinance. The provision attributes certain

duties to those who are licensed to operate motor vehicles within the Commonwealth. Approximately 34 other states have adopted similar hit and run statutes. The Courts of various states have interpreted their respective statutes to apply different levels of culpable mental state as an element of the offense. A reasonable man's standard is the most widespread view. In Commonwealth v. Kauffman, 323 Pa. Super. 363, 470 A.2d 634 (1983), our Superior Court held that a violation of the hit and run statute occurs whenever a driver knows or in the exercise of reasonable care should know that his vehicle was involved in an accident. This is the precise instruction submitted by this Court to the jury in the case at bar. While it is true that Commonwealth v. Kauffman, supra involved damage to property rather than injury or death of a person, clearly the duty

imposed upon licensed motor vehicle operators to persons they may injure could not be less than the duty they have to property they may damage. To hold otherwise would allow drivers to remain oblivious, however unreasonably to the effects of their driving on fellow human beings.

In the case at bar, testimony was provided by Sergeant William Yodice, a witness qualified as an expert in the field of accident reconstruction. Sergeant Yodice testified that Defendant's right front of his vehicle made impact with Mr. Livingston who was walking in the roadway and then collided with a telephone pole. (N/T 196). The Sergeant concluded that the pedestrian was impelled onto the right front hood of the Defendant's vehicle, that the victim remained on the hood of the car and then fell into the roadway. (N/T 197, 199, 206). We believe

the instruction given to the jury was proper in this factual setting.

The final issue raised by Defendant is whether this Court erred when it denied Defendant's proposed Point for Charge No. 1. Point for Charge No. 1 reads as follows:

> "In this case, the Defendant is charged with a violation of a section of the Motor Vehicle Act commonly known as 'Hit and Run'. I have read the language of the law to you. I now charge you that the purpose of this law is to prevent drivers from leaving the scene of an accident and trying to avoid their responsibilities. In applying this law you should be guided by the following principles. Substantial compliance with the law is sufficient to avoid conviction if the spirit of the statue is fulfilled. Thus, you may refuse to convict Mr. Felker if you believe that there was only technical violations of the law. Technical applications of the law give way to considering the circumstances of the accident together with the purpose of the law. If you believe that Mr. Felker was initially not sure of his involvement in an accident which entailed personal injury to another, and that he returned home, and after having the

> opportunity to reflect, notified the police; if you believe these actions were reasonable and not the acts of a person trying to evade his responsibilities, then you must find Mr. Felker not guilty. Commonwealth v. Gosnell, 327 Pa. Super. 465, 476 A.2d 46, 47-48 (1984)."

The issue presented is whether Defendant's informing police on the following morning of the accident constituted substantial compliance with the hit and run statute. If, however, Defendant knew or should have known that he was in an accident involving personal injury or death, compliance with the statute would require an immediate stop of his vehicle at the scene of the accident for the purpose of giving information and rendering aid.

Review of the adequacy of a jury instruction requires that the charge be read and considered in its entirety, with its general effect controlling. Commonwealth v.

Fields, 317 Pa. Super. 387, 464 A.2d 375 (1983). In the instant case, we believe the charge as given fully explained all elements of the offense. Unlike Commonwealth v. Gosnell, supra where the defendant after proceeding two or three blocks promptly returned to investigate the scene of the accident and did render aid to the victim, the circumstances in the case at bar involved a blatant level of unawareness and unconcern which rises beyond that of a mere technicality.

J. 05042/89

COMMONWEALTH OF PENNSYLVANIA	:	IN THE
	:	SUPERIOR
V.	:	COURT OF
	:	PENNSYLVANIA
ROBERT E. FELKER,	:	NO. 2442
Appellant	:	Philadelphia
	:	1988

ORDER

The court hereby denies the application filed April 3, 1989, requesting reargument or reconsideration of the decision dated March 20, 1989.

PER CURIAM

IN THE
SUPREME COURT OF PENNSYLVANIA

NO. E.D. ALLOCATUR DOCKET 1989

COMMONWEALTH OF PENNSYLVANIA

vs.

ROBERT E. FELKER,

Defendant/Appellant

PETITION FOR ALLOWANCE OF APPEAL

Petition for Allowance of Appeal from decision of the Superior Court of Pennsylvania,
No. 2442 Philadelphia 1988, March 20, 1989.
Application for Reargument denied May 8, 1989.

JOHN A. HISCOTT, ESQUIRE
Attorney I.D. No. 08206
Attorney for Defendant/Appellant
Robert E. Felker

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COMMONWEALTH OF PENNSYLVANIA,	:	
	:	
Plaintiff/Appellee	:	
	:	IN THE
vs.	:	SUPREME COURT
	:	OF THE
ROBERT E. FELKER,	:	COMMONWEALTH
	:	OF
Defendant/Appellant	:	PENNSYLVANIA
	:	
	:	NO.

PETITION FOR ALLOWANCE OF APPEAL

TO THE HONORABLE JUDGES OF THE SAID COURT:

Robert E. Felker, by his attorneys, Hiscott and Robinson, respectfully presents this petition upon the following facts:

1. No official or unofficial report of the opinion of the Superior Court has been reported to date.

2. The opinion of the Superior Court of Pennsylvania is appended hereto as Exhibit "A." The opinion of the Suppression Judge in the lower court is set forth in the Superior Court's opinion as Appendix "A" and the opin-

ion of the lower court with respect to post-trial motions is set forth in the Superior Court's opinion as appendix "B."

3. On March 20, 1989, a final judgment was made by the Superior Court of Pennsylvania upholding the lower court's holdings as follows:

A. That physical evidence taken by the police without a search warrant from Defendant/Appellant's truck, after the police had impounded the truck, without the express consent of Defendant/Appellant and absent exigent circumstances, would not be suppressed.

B. That it was proper for the lower court to charge the jury that they could find Defendant guilty of the misdemeanor charge of hit and run if the Commonwealth could prove that Defendant/Appellant knew or in the exercise of reasonable care

should have known that his truck was involved in an accident resulting in injury or death to a person, thus imposing a civil negligence standard for the culpability requirements of the offense charged.

4. Defendant/Appellant filed an Application for Reargument with the Superior Court, which was denied by the Superior Court per curiam on May 8, 1989. A copy of that order is attached as Exhibit "B."

5. The facts material to the consideration of the questions presented herein and the reasons and grounds for the desire to appeal are as follows:

A. SUPPRESSION ISSUE

On February 26, 1987, a pedestrian was struck and killed by an motor vehicel on Eighth Street in Stroudsburg, Pennsylvania. The following morning, after reading about

the incident in the newspaper, Defendant/ Appellant, who had driven on Eighth Street the evening before and grazed a telephone pole, contacted his lawyer, who then contacted the police.

The police came to Defendant/Appellant's place of business on the morning of February 27, 1987, at which time Defendant/Appellant allowed the police to impound his truck. Defendant/Appellant was arrested one week later, on March 5, 1987. The Suppression Judge found that after impoundment, several pieces of physical evidence were removed by the police from the truck without a warrant, without the express consent of Defendant/ Appellant and absent exigent circumstances. These facts have not been disputed.

The Superior Court's decision that the items of evidence removed from Defendant/ Appellant's truck by the police without a

search warrant is not in accord with the decision of the Supreme Court in Commonwealth vs. Baker, 518 Pa. 145, 541 A.2d 1381 (1988). Baker confirmed the principle that "automobiles are not per se unprotected" by the warrant requirements of the Fourth Amendment to the United States Constitution and Article I, Section 8, of the Pennsylvania Constitution.

Baker upheld a search of an automobile which had just been stopped within thirty minutes of a commission of a crime, where probable cause existed. The Supreme Court held that "inasmuch as the requirement of probable cause was satisfied, the exigencies of the mobility of the vehicle and of there having been inadequate time and opportunity to obtain a warrant rendered the search proper."

The instant proceeding does not fall

within the bounds of recognized exceptions to the search warrant requirements. Defendant/ Appellant was not arrested until seven days after his truck was impounded, so it was not a search incident to an arrest. This was not a search of a vehicle which had been suddenly encountered and stopped by the police. There was no identifiable contraband in plain view of the vehicle. These recognized exceptions were reviewed by the Supreme Court in Commonwealth v. Ionata, 518 Pa. 471, 544 A.2d 917 (1988).

See also Coolidge vs. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971):

> "Since the truck, at the time of the search was not so mobile that the opportunity to search was fleeting, the seizure of the items was illegal and the evidence should be suppressed."

B. CULPABILITY CHARGE

Defendant/Appellant submitted a requested point for charge to the lower court that the Commonwealth had the burden of establishing actual knowledge of death or injury. The charge was denied over objection and the jury was charged that they only had to find that the Defendant/Appellant "in the exercise of reasonable care should have known that his truck was involved in an accident resulting in injury or death to a person."

The lower court's charge with respect to the knowledge of Defendant/Appellant applied a civil negligence standard to the culpability elements of the misdemeanor offense that Defendant/Appellant was charged with.

The Superior Court's ruling on the lower court's charge is not in accord with the Supreme Court decision of Commonwealth v. Heck, 517 Pa. 192, 535 A.2d 575 (1987). Heck held that the applicable mens rea requirements of

culpability are those enumerated in 18 Pa. C.S.A. Section 302.

The requisite culpability requirements applicable to this case are as follows:

> "A person acts knowingly with respect to a material element of an offense when:
>
> 1. If the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of the nature or that such circumstances exist." 18 Pa. C.S.A. Section 302 (b)(2)(i)."

The Pennsylvania Crimes Code clearly established an actual knowledge standard and the jury in Defendant/Appellant's case was not charged in accordance with this standard.

The conviction of Defendant/Appellant based on the civil negligence standard violates both Article I, Section 9 of the Pennsylvania Constitution and the due process clauses of the 5th and 14th Amendments to the United States Constitution.

6. No opinions have been delivered regarding this matter other than the opinion of the Superior Court of Pennsylvania, appended hereto as Exhibit "A," which includes the lower court opinions.

7. The following provisions of the United States and Pennsylvania constitutions are applicable to this matter:

A. Fourth Amendment to the United States Constitution (U.S.C.A. Const. Amendment 4):

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

B. Article I, Section 8 of the Constitution of the Commonwealth of Pennsylvania:

"The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant."

8. The statutory provisions applicable in this matter are 75 Pa. C.S.A. 3742(a) and 18 Pa. C.S.A. 302(b)(2)(i).

A. 75 Pa. C.S.A. 3742(a):

"(a) General rule. The driver of any vehicle involved in an accident resulting in injury or death of any person shall immediately stop the vehicle at the scene of the accident or as close thereto as possible but shall then forthwith return to and in every event shall remain at the scene of the accident until he has fulfilled the requirements of section 3744 (relating to duty to give information and render aid). Every stop shall be made without obstructing traffic more than is necessary."

B. 18 Pa. C.S.A. 302(b)(2)(i):

"A person acts knowingly with respect to a material element of an

offense when if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist."

WHEREFORE, your Defendant/Appellant respectfully requests permission to file an appeal in this matter, for the reasons stated herein, to the Supreme Court of Pennsylvania.

HISCOTT AND ROBINSON,

By:_____

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DATED: _____